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No. (1)

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In The Supreme Court of the United States

KEVIN L. GEDDINGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. How should the scope of the "honest services fraud" statute, 18 U.S.C. § 1346, be interpreted so as to prevent overbreadth and vagueness problems, avoid undue Federal interference in state affairs, and conform to the rule of lenity?

2. Was 18 U.S.C. § 1346 unconstitutionally vague as applied to the facts of the instant case?

PARTIES TO THE PROCEEDING

The parties to the instant case are the United States of America and petitioner Kevin Geddings.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) because this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Fourth Circuit in a criminal case. This petition is timely because the Fourth Circuit's judgment was entered on May 19, 2008 and petitioner's suggestion for rehearing *en banc* was denied on June 16, 2008. See Supreme Court Rules, § 13(3). There have been no orders extending the time to petition for *certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1346:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF FACTS

This case stems from the alleged nondisclosure of a potential conflict of interest between petitioner Kevin Geddings, who was a North Carolina state lottery commissioner for 40 days, and lottery vendor Scientific Games. This relationship began during 2000, when petitioner operated a public relations firm in South Carolina and Scientific Games was seeking a contract to operate the South Carolina lottery. Between 2000 and 2002, petitioner's firm billed Scientific Games approximately $131,545 for video production, focus groups and lobbying relating to the South Carolina lottery.

In May 2004, after petitioner moved to North Carolina, Scientific Games paid his firm a further $7500 for video production. Petitioner did not conduct any additional work for Scientific Games until after the lottery became politically controversial in North Carolina in spring 2005.

In April 2005, after the lottery had been placed on the agenda in the North Carolina Legislature, petitioner sent an exploratory email to the Governor's office inquiring about the possibility of being appointed a commissioner if the bill passed. He stated that he had no lottery vendor clients,

which was then true, because he had not performed any work for Scientific Games in almost a year. *After* being informed that he was not under consideration, petitioner contacted Scientific Games with respect to North Carolina public relations work.

In late May 2005, petitioner billed Scientific Games $5000 for preparing Senator Tony Rand for a televised debate. In addition, during June through August 2005, petitioner billed Scientific Games a $5000 monthly retainer and a further $4500 for radio advertising. Although some of these invoices were not processed and paid by Scientific Games until after petitioner's appointment, it is undisputed that the bills were *sent* no later than September 1, 2005 and related to work performed in August or before.

The North Carolina legislature approved the lottery on August 30, 2005 and the Governor signed it into law the following day. That statute created a nine-member commission with five members appointed by the Governor, two by the president *pro tempore* of the Senate and two by the speaker of the House. See N.C. Gen. Stat. § 18C-111(a). Commissioners were to be unsalaried and receive only $15 *per diem* allowance plus travel and subsistence. See N.C. Gen. Stat. §§ 18C-111(e); 138-5.

On September 6, 2005, petitioner Geddings, then a public relations consultant and owner of talk-radio stations in Charlotte, emailed Speaker Jim Black's political director Meredith Norris to inquire about being appointed to the Commission. Ms. Norris responded that "all appointments had been made." In subsequent correspondence with Scientific Games vice-president Alan Middleton, Ms. Norris indicated that Bob Cordle and Gordon Myers would be Speaker Black's appointees.

It was not until September 21, 2005 that Mr. Cordle became unable to serve and that his seat became vacant. Subsequently, at a dinner with Speaker Black at which petitioner was absent, Mr. Middleton and Ms. Norris proposed petitioner's name for the vacant seat. Speaker Black agreed, and telephoned petitioner to inform him that he was appointed. The appointment was publicly announced the following day, and on September 23, Governor Easley sent petitioner a letter formally naming him to the Commission and requesting that he execute an oath of office.

It is undisputed that petitioner was terminated as a vendor by Scientific Games on the date of his appointment and that he neither sought nor received compensation from Scientific Games

while in office.[1]

On September 24, a Greensboro newspaper article alleged that petitioner was a long-time friend of Mr. Middleton and that his firm had conducted focus groups in 2000-01 for IGT-Anchor Gaming, which was subsequently purchased by Scientific Games. Based on this disclosure, which was acknowledged by petitioner, Lottery Commission chairman Charles Sanders decided that it would be "inappropriate" for petitioner to participate in vendor selection matters.

When Chairman Sanders assigned the newly appointed commissioners to subcommittees, petitioner neither sought nor accepted appointment to the vendor selection committee. Instead, he was named to the personnel subcommittee. Moreover, when the Commission held its inaugural meeting on October 6, petitioner voluntarily recused himself from vendor selection votes.

On the same date, petitioner submitted a "Long Form Statement of Economic Interest" ("ethics

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[1] Petitioner's secretary erroneously prepared another invoice in September, but it is undisputed that this invoice was never sent and that petitioner never instructed that it be sent.

form"). Completion of the ethics form, which was reviewed by the North Carolina Board of Ethics, was not required by any state statute, but was instead mandated by Executive Order 1 as renewed by Executive Order 76. The Board of Ethics could recommend certain remedial measures in cases where a public official had a potential or actual conflict of interest, but had no power to disqualify an official and had never done so.

In Question 16 of the ethics form, petitioner was asked to "provide any other information which a reasonable person would conclude is necessary or helpful either to carry out the purposes of this Order or to fully disclose any potential conflict of interest or appearance of conflict." The question, which Board of Ethics executive director Perry Newson described as a "catchall," directed petitioner to "[i]dentify any conflicts or potential conflicts you may *have* that are not fully or adequately covered elsewhere in this form."[2] Petitioner did not list any information in response to this question.

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[2] At trial, petitioner expressed the belief that, based on the present-tense language in the question, it sought disclosure of present conflicts of interest rather than those resulting from past relationships.

Subsequently, Mr. Newson contacted petitioner and expressed his concern that the ethics form did not reflect the disclosures that had been made in the media. Consequently, on October 10, 2005, petitioner submitted an amended ethics form. In response to Question 16, petitioner stated in pertinent part that he was a friend of Mr. Middleton, that he had conducted focus groups for IGT, that he had met the staff of Gtech (Scientific Games' principal competitor) while serving as the South Carolina Governor's chief of staff, and that he had "learned much form listening to the 'lessons learned' by executives *from both major lottery system companies*" (emphasis added). He also pledged that he would not accept lottery advertising contracts for his radio stations or vote on any final vendor contract award involving Scientific Games or Gtech.

During his tenure on the Commission, petitioner engaged in such activities as suggesting a name for the lottery, reserving a web site for the lottery's homepage, making technical recommendations concerning requests for proposals (RFPs) and discussing marketing and promotion. Petitioner also emailed his fellow commissioners articles on matters of interest. Although the Government has characterized some of these articles as "negative to Gtech," it is undisputed that (1) petitioner did not disparage Gtech or promote

Scientific Games in the emails; and (2) petitioner also emailed positive articles about states such as Georgia where the lottery was operated by Gtech. None of the fellow commissioners interpreted these articles as advocacy, and none of them complained to the Board of Ethics regarding the emails.[3]

Moreover, it is beyond dispute that the emails concerned subjects of pertinent and compelling interest to a start-up lottery. For instance, the article that formed the centerpiece of the Government's case against petitioner concerned the relationship of then-Supreme Court candidate Harriet Miers to Gtech while she served on the Texas lottery commission. This was a topic that was receiving extensive coverage in all major news media, was relevant to a fledgling lottery commission, and was hardly something of which the commissioners would have been unaware. Thus, the email fell within the scope of informal free speech on

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[3] The Government further contended on appeal that petitioner passed "confidential" information to Alan Middleton and that he spoke on the telephone with Mr. Middleton during his tenure on the commission. The information at issue, however - the makeup of the personnel committee - was not confidential, and despite the fact that Scientific Games cooperated with the Government, no evidence was produced of the content of the calls. It should be noted in this context that Mr. Middleton was a long-standing friend of the petitioner.

matters of interest, which Mr. Newson had found to be ethical in Advisory Opinion AO-01-001.

Petitioner also recommended a candidate for the executive director position who had a close relationship with Gtech. Specifically, petitioner forwarded the resume of Paul Lanteigne, a serving Virginia lottery commissioner, with a strong recommendation that he be hired. At that time, Virginia used its own system for online lottery ticketing and used Gtech for instant ticket vending machines. Mr. Lanteigne was one of the seven candidates chosen as finalists for the executive directorship.

On November 1, 2005, Scientific Games made a public filing that revealed the $24,500 it had paid to petitioner in consulting fees during 2005. When this information became public, petitioner resigned from the Commission. Subsequently, after a competitive bidding process in which prospective vendors were evaluated according to an objective point system, Gtech was awarded both the online and instant ticket contracts.

In March 2006, petitioner was indicted in the Eastern District of North Carolina on nine counts of "honest services" mail and wire fraud. Counts One through Five related to petitioner's oath of office, the

ethics forms and his letter of appointment as a commissioner. Counts Six and Seven related to two communications made *prior* to petitioner's appointment in which he sought a position on the Lottery Commission. Counts Eight and Nine related to emails sent to fellow commissioners that the Government contended were negative toward Gtech.[4]

The language of the indictment revealed that the gravamen of the charges against petitioner pertained to nondisclosure of material information concerning his relationship with Scientific Games. The "objects of the scheme," as stated in the indictment, were to deprive the citizens of North Carolina of their right to have a disinterested and unbiased officialdom, their right "to be informed of all material facts and circumstances concerning potential sources of influence on Geddings," and "their right to material information concerning the personal financial interests of public officials." The "manner and means" of the scheme were allegedly that, in addition to "work[ing] to achieve enactment

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[4] The district court had jurisdiction pursuant to 18 U.S.C. § 3231, which provides that "the district courts of the United States shall have jurisdiction, exclusive of the courts of the States, over all offenses against the laws of the United States."

of a state lottery for North Carolina," petitioner "actively concealed and failed to disclose payments from Scientific Games" and "misle[d] the chairman of the North Carolina Lottery Commission... regarding his business relationship with Scientific Games." Notably, it was neither alleged nor proven that petitioner received any bribes, kickbacks or gratuities, or that he performed corrupt acts in office.

During trial, Count Eight was dismissed at the Government's motion. In addition, at the close of the petitioner's case, defense counsel moved to dismiss all counts on the ground of insufficient evidence and unconstitutional vagueness, and also moved to dismiss Counts Six and Seven because they pertained to conduct committed at a time when petitioner was not a public official. The district court dismissed these counts, finding that petitioner had no duty of honest services to the people of North Carolina before he became a commissioner, and reserved decision as to the other counts.

During the Government's summation, the prosecution again made clear that the gravamen of the scheme was nondisclosure of material information, repeatedly urging the jury that nothing more was required to convict petitioner. This argument culminated in the following statement by

the prosecutor:

> When Kevin Geddings took official acts during the 40 days that he was a member of the lottery commission, under the cloud of this tremendous conflict of interest, this actual conflict of interest as testified to by Beth Carpenter and Perry Newson, when he took any action under that cloud, it doesn't matter whether it ended up helping Scientific Games or not, he was breaking the law. *He was violating his duty of honest services by taking those official acts while under this conflict of interest. And that's the scheme alleged, and that's the scheme we proved* (emphasis added).

Subsequently, Counts One to Five and Nine were submitted to the jury. After deliberation, the jury acquitted petitioner of Count Nine, rejecting the Government's theory that his emails were a form of advocacy for Scientific Games. However, the jury convicted petitioner on Counts One through Five. Subsequently, the district court issued a written order denying petitioner's motion for acquittal.

On May 7, 2007, the district court sentenced

petitioner to 48 months' imprisonment, a variance of seven months above the advisory Guideline range. Judgment was entered on May 17, 2007.

Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Fourth Circuit. As pertinent to this proceeding, petitioner argued that his alleged conduct fell outside the scope of 18 U.S.C. § 1346 and that the statute was unconstitutionally vague as applied. His argument was based on a combination of Fourth Circuit precedent, particularly United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), upheld in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), and recent cases from a majority of Circuits holding that the honest services statute must be limited due to federalism and overbreadth concerns.

Petitioner's appeal was orally argued before the Fourth Circuit on January 31, 2008. On May 19, 2008, the Court of Appeals issued an unpublished opinion affirming petitioner's conviction. Petitioner then timely applied for rehearing *en banc*, which was denied by the Fourth Circuit on June 16, 2008. This petition followed.

POINT I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN CIRCUIT COURTS REGARDING THE SCOPE OF THE HONEST SERVICES FRAUD STATUTE AND TO ENSURE THAT IT IS APPLIED CONSTITUTIONALLY

The last time this Court addressed the issue of "honest services" fraud, it was to deny that such a thing existed. In McNally v. United States, 483 U.S. 350 (1987), this Court put an abrupt end to the burgeoning Federal jurisprudence holding that the mail and wire fraud statutes could be used to punish breaches of fiduciary duty by public and private employees.[5] In McNally, which stemmed from a

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[5] The doctrine of honest services fraud, or "intangible rights" fraud as it was often called prior to McNally, is often characterized as beginning in the 1970s. See United States v. Mandel, 862 F.2d 1067, 1071 (4th Cir. 1989) (discussing the origin of the doctrine). The Eighth Circuit election fraud case of United States v. States, 488 F.3d 761, 764 (8th Cir. 1973) is often cited as the original public-sector honest services fraud case, and United States v. George, 477 F.2d 508, 513 (7th Cir. 1973) is frequently viewed as the beginning of the doctrine in the private sector. It should be noted, however, that while the States and George courts were among the first to articulate a

scheme in which two Kentucky officials awarded a state insurance contract in return for kickback payments, this Court held that the term "scheme or artifice to defraud" within the meaning of the Federal fraud statutes did not extend to intangible rights. See id. at 357-60. After tracing the history of criminal fraud jurisprudence in the Federal courts as well as various codifications of the mail and wire fraud statutes, this Court concluded that Congress did not intend to depart from the "common understanding" of fraud as involving property rights. See id. at 359. As such, this Court held that the rule of lenity required that the statute be limited to that understanding:

> The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Rather than construe the statute in a*

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coherent doctrine of honest services fraud, both courts cited antecedent cases going back to the 1930s.

> *manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials*, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

Id. at 359-60 (citations omitted) (emphasis added); see also Carpenter v. United States, 484 U.S. 19, 25 (1987) (reaffirming that mail and wire fraud statutes were limited to wrongful deprivation of property rights).

Congress responded to McNally and Carpenter in 1988 by enacting 18 U.S.C. § 1346, which states in its entirety that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Twenty years later, it can certainly be said that this statute accomplished the legislative overruling of McNally.[6]

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[6] At least, it did so partially. In Cleveland v. United States, 531 U.S. 12, 19-20 (2000), this Court held that, in enacting Section 1346, "Congress [revived] only the intangible right of honest services even though federal courts, relying on

It is far from clear, however, what else Congress has accomplished. The 28 words of this statute, which were enacted in preference to a far more specific draft,[7] have been repeatedly criticized as vague. See, e.g., United States v. Brown, 459 F.3d 509, 520, 522

McNally, had dismissed, for want of monetary loss to any victim, prosecutions under § 1341 for diverse forms of public corruption, including licensing fraud." In consequence, this Court held that a private applicant for a state license did not commit mail or wire fraud by falsifying certain application materials, given that the applicant himself owed no fiduciary duty to the state in making the application. See id. at 20-22. This Court has thus held that deprivation of intangible rights *other* than the right to honest services cannot be prosecuted as mail fraud. It has not defined, however, the precise boundaries of the right to honest services, nor has it delineated where that right ends and other intangible rights begin.

[7] A House of Representatives draft bill, which was referred to the House Committee on the Judiciary but never acted upon, would have redefined the scope of Federal mail and wire fraud to include "the defrauding of the citizens of a body politic (1) of their right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official thereof; or (2) of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud." See H.R. 3050, 100th Cong., 1st Sess. (1988), discussed in United States v. Brumley, 116 F.3d 728, 743 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting).

& n.9 (5th Cir. 2006) (Section 1346 is "vague and amorphous on its face," and its "outer boundaries... must be determined from the factual circumstances supporting affirmed convictions"); United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) ("the concept of 'honest services' is vague and undefined by the statute"). With the statute worded so broadly and amorphously, the term "honest services" can mean nearly anything at all, raising the specter of any ethical lapse or rule violation by a public official being made into a Federal felony at the Government's discretion. Indeed, since Section 1346 has been the vehicle of choice for such controversial prosecutions as that of former Alabama Governor Don Siegelman and former Wisconsin procurement specialist Georgia Thompson,[8] the breadth of the statute has arguably turned it into a tool for selective prosecution by a politicized Justice Department.[9]

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[8] See United States House of Representatives, Committee on the Judiciary Majority Staff, Allegations of Selective Prosecution in Our Criminal Justice System (Apr. 17, 2008), available online, http://blog.al.com/bn/2008/04/sieg417.pdf (discussing, *inter alia*, the Siegelman and Thompson cases).

[9] It is worth noting in this regard that petitioner Geddings is a well-known Democratic Party activist in North and South Carolina, who successfully managed Democrat Jim

The ambiguity about the meaning of Section 1346 has only been heightened by the post-McNally jurisprudence construing its scope, during which the Federal courts have overseen both a remarkable expansion and a partial contraction. Initially, the Federal courts spoke of honest services in terms of "moral uprightness, of fundamental honesty, fair play and right dealing" - language which placed almost no limits on the category of conduct that could be charged as a Federal crime. See, e.g., United States v. Goodman, 984 F.2d 235, 239-40 (8th Cir. 1993). By the late 1990s, however, the courts' focus had begun to shift. Numerous Circuits, informed by the prohibition against Federal common-law crimes and the need to avoid excessive intrusion into state and local affairs, began to concentrate instead on *limiting* its reach - but not all did so, and those that did chose different approaches.

One of the first circuit courts to limit the scope of the statute, United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), held that the purpose of the statute was not to "garner to the federal government the right to impose upon states a

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Hodges' 1998 gubernatorial campaign, and who was prosecuted by a Republican United States Attorney and sentenced by a judge who was formerly counsel to the North Carolina Republican Party.

federal vision of appropriate services — to establish, in other words, an ethical regime for state employees." Other courts decried the "violation of state autonomy" resulting from broad use of the honest services statute, see United States v. Panarella, 277 F.3d 678, 693 (3d Cir. 2002), and warned against "the temptation to dilate criminal statutes so that corrupt officials get their comeuppance." United States v. Genova, 333 F.3d 750, 757-58 (7th Cir. 2003). The "fair play and right dealing" language itself came in for withering criticism from courts concerned about the possibility of limitless prosecutions. See United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996); United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996).

Several recent decisions represent an acceleration of this trend. In United States v. Brown, 459 F.3d 509 (5th Cir. 2006), the Fifth Circuit stated that, in light of "the limiting arguments presented" by recent case law, its precedents applying a broad interpretation of honest services fraud were restricted to their facts. See id. at 522 n.13. In language pertinent to this case, the court characterized such fraud as "an understood *divergence*, rather than a secret *conflict*, of interests," and that it must be evinced by "something close to bribery." Id. at 521 (emphasis in original). Moreover, the scope of the offense would henceforth

be defined, not by the explicit restrictions articulated in prior case law, but by the corpus of cases in which convictions had been affirmed. See id. at 520-22.

In United States v. Thompson, 484 F.3d 877 (7th Cir. 2007), Judge Frank Easterbrook, writing for the Seventh Circuit, engaged in an extended digression on the need to prevent all violations of state rules from being prosecuted as Federal crimes. The court noted that the limitless interpretation of Section 1346 advocated by the Government "ha[d] the potential to turn violations of state rules into federal crimes," and that "[b]ecause no one really thinks that § 1346 treats all legal errors by public employees as criminal, it has been necessary to cabin the reach of that statute." Id. at 882. As such, it held that a petitioner who violated state ethical rules by steering a contract to a politically connected vendor, unaccompanied by personal gain or venal motives, could not be found guilty of honest services fraud. Id. at 882-84.

Most recently, in United States v. Urciuoli, 513 F.3d 290 (1st Cir. 2008), the First Circuit reversed the convictions of certain Rhode Island hospital officials who had participated with a state legislator in undisclosed lobbying and steering of business. Again, the court held that not everything done under the "cloak of office," even if arguably

improper or unethical, amounts to Federal fraud. See id. at 294-96. Moreover, the Urciuoli court, like Brown and Thompson, engaged in extended discussion of the need to limit the scope of the statute as applied to gray areas, and suggested that state law, while not controlling in all instances, "might bear on what 'services' are owed" in situations that do not amount to classic common-law fraud. See id. at 298-99 (noting, *inter alia*, that the jury could have been misled by the allegation that a state senator committed a crime simply by "wrongfully act[ing] while under a conflict of interest").[10] Thus, in contrast to the dialogue that was occurring soon after McNally, there is now a national conversation among the Federal courts of appeal as to how to *limit* the scope of the honest services doctrine.[11]

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[10] It should be noted that, as stated above, the Government repeatedly argued to the jury during summation that an undisclosed conflict of interest alone constituted honest services fraud and that Mr. Geddings was committing a crime simply by serving as a commissioner under such a conflict.

[11] The Eighth Circuit has also recently noted the debate over limiting the scope of honest services fraud, although it declined to take a position on that debate in light of the facts before it. See United States v. Jennings, 487 F.3d 564, 577-78 (8th Cir. 2007).

Not all courts, however, have engaged in this dialogue. Some courts continue to hold that virtually any breach of fiduciary duty by a public official can be prosecuted as mail or wire fraud, see United States v. Harvey, ___ F.3d ___, 2008 WL 2720718, *3 (4th Cir. 2008); United States v. Browne, 505 F.3d 1229, 1265-66 (11th Cir. 2008), or limit the statute only by requiring some foreseeable harm to the government. See United States v. de Vegter, 198 F.3d 1324, 1329-30 (11th Cir. 1999); United States v. Sun Diamond Growers of California, 138 F.3d 961, 973-74 (D.C. Cir. 1998). In these circuits, criminal liability for ethical or administrative lapses by state and local officials is, in practice, limited only by prosecutorial discretion.[12] Moreover, as shown by the above cases, the courts that *have* adopted a limiting approach have done so in widely varying ways.

Thus, not only is there no clear definition of the type of "honest services" that can serve as a predicate for a mail or wire fraud prosecution, but a public official's act may be a Federal crime in one

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[12] Although the "reasonably foreseeable harm" test is ostensibly a limitation, it does not limit the statute in practice, because nearly anything can be called "harm" in a public-sector context.

part of the country but not so in another.[13] In borderline cases such as the instant case, where the Federal penal code was used to punish the appearance of corruption rather than the reality, this can lead to petitioners such as petitioner Geddings being sentenced to four years in prison for performing, in North Carolina, an act that would not be a crime in Chicago, Philadelphia or Providence.

This multi-faceted circuit split is, alone, sufficient reason for this Court to grant *certiorari.*[14] Even more than that, however, the rule of lenity concerns discussed in McNally remain compelling.

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[13] This is a particularly acute problem for public officials whose duties take them to more than one state, such as police officers sent to perform an out-of-state extradition, employees of state or municipal liaison offices in neighboring jurisdictions, or employees of multi-state agencies. An official of the Port Authority of New York and New Jersey, for instance, which exists in both the Second and Third Circuits, may or may not be committing a Federal crime by violating state conflict of interest laws depending on which side of the Hudson River she is on at any given time.

[14] Rule 10 (a) of the Rules of the United States Supreme Court states that a key consideration in whether to grant *certiorari* from a decision of a United States Court of Appeals is whether that decision is "in conflict with the decision of another United States Court of Appeals on the same important matter."

Two decades after Congress enacted Section 1346, the Federal courts continue to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." McNally, 483 U.S. at 359. The only difference is that now, rather than accomplishing this through an expansive definition of the term "scheme to defraud," some courts do so through an overbroad construction of the term "honest services."

This Court has, in its recent criminal jurisprudence, emphasized the continuing vitality of the rule of lenity, reiterating that the rule "requires ambiguous criminal laws to be interpreted in favor of the petitioners subjected to them" and that the courts must not "speculate regarding a dubious congressional intent." United States v. Santos, 128 S. Ct. 2020, 2025-26 (2008) (Scalia, J., plurality opinion). Here, because Congress has neither stated its clear intent regarding the scope of the honest-services statute nor clearly stated its intent that the statute apply to undisclosed conflicts of interest that do not result in pecuniary gain, this Court should apply the rule of lenity and adopt one or more of the limiting principles articulated by the circuit courts. These are fourfold, and are discussed in greater detail as follows:

The Federalist Approach

The Fifth and Third Circuits have taken a federalist approach by requiring that conduct charged as federal fraud be independently prosecutable under a state penal law. In United States v. Brumley, 116 F.3d 728 (5th Cir. 1997), the Fifth Circuit explained that this rationale allows states to define, in the first instance, what manner and degree of "honest service" they expect of their officials:

> [T]he rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of "good government" with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness. Congress did not use those words, and we will not supply them.

Brumley, 116 F.3d at 735. Moreover, the violation of state penal law must involve actual corruption, not merely the appearance of corruption. Id. at 734.

Likewise, the Third Circuit in Panarella held

that "state law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud," explaining that "the existence of a violation of state law in this case mitigates the federalism concerns that arise from federal prosecutions of local public officials." See Panarella, 277 F.3d at 692-93. By this approach, "the intrusion into state autonomy is significantly muted, since the conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize." Id. at 694.

Moreover, although the First Circuit does not require a violation of state law in all instances, its recent Urciuoli decision held that state law is relevant where the petitioner's conduct falls into a gray area between a purely civil wrong and common-law fraud. Specifically, the court held that a legislator's undisclosed lobbying and influence peddling was not fraudulent because state law would have permitted him to perform those acts openly for pay. See Urciuoli, 513 F.3d at 294-96. Clearly, that has resonance in the instant case, where Mr. Geddings' conduct also fell within a gray area and where the emails and telephone calls that the Government alleges were fraudulent would not have

been improper if made openly.[15]

The Eighth Circuit has recently noted the dispute over whether honest-services fraud requires an underlying state law violation, albeit declining to take a position on the facts before it. In United States v. Jennings, 487 F.3d 564, 577-78 (8th Cir.

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[15] Another federalist concern noted by the Urciuoli court is sensitivity to the realities of part-time state and local public service. Noting that one of the petitioners was a part-time state senator and that state law permitted him to engage in paid lobbying and advocacy, the court held that his influence peddling was an "unavoidable result of Rhode Island's decision to retain a system of government in which legislators hold outside employment without very stringent restrictions." Urciuoli, 513 F.3d at 296; see also United States v. Walker, 490 F.3d 1282, 1297 n.17 (11th Cir. 2007) (noting that state legislators "often have careers and businesses beyond their roles as a state official" and "are not guilty of honest services mail fraud just because they engage in business with a company that may be involved in the legislative process"). The instant case requires similar cognizance of North Carolina's system of part-time, unsalaried public boards, in which members cannot be expected to fully insulate themselves from contact with outside vendors or to refrain from informal advocacy. Indeed, this state of affairs has been recognized by the former North Carolina Board of Ethics, which is clearly the best judge of what "honest services" may be expected from members of that State's boards. See Adv. Op. AO-01-001 (N.C. Bd. Ethics 2001).

2007), the court outlined the disagreement over whether a Minnesota official could be held liable under Section 1346 without proof that he violated a state disclosure statute, but "save[d] our discussion of the limits of § 1346 for a future case" because there was unquestionable proof of such a violation. At least one subsequent district court within the Eighth Circuit, United States v. Rehak, 2008 WL 2828886, *1 (D. Minn. 2008), has spoken strongly in favor of requiring an underlying violation of a state-imposed duty. It would appear that, at minimum, the Eighth Circuit and the courts within it have recognized the need for some "limits [on] Section 1346," albeit leaving their exact contours for another day.[16]

The "Private Gain" Approach

A second approach has been adopted in the Seventh Circuit in a series of decisions authored by Judge Frank H. Easterbrook. In United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998), the court

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[16] Two judges of the Seventh Circuit have also decried that court's failure to explore whether to adopt a "state law limiting principle" for honest-services fraud. See United States v. Sorich, ___ F.3d ___, 2008 WL 2579186, *3 (7th Cir. 2008) (Kanne & Posner, JJ., dissenting from denial of rehearing en banc).

held that "misuse of position *for private gain* is the line that separates run of the mill violations of state-law fiduciary duty... from federal crime" (emphasis added). The Thompson court further held that "private gain" itself has a restricted meaning, namely situations involving "third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract." Thompson, 484 F.3d at 882; see also United States v. Frost, 125 F.3d 346, 365 (6th Cir. 1997) (honest-services fraud "is anchored upon petitioner's misuse of office for personal profit"); United States v. de Vegter, 198 F.3d 1324, 1328 (11th Cir. 1999) ("[i]llicit personal gain by a government official deprives the public of its intangible right to the honest services of the official").[17]

At least one other court, while not fully adopting the Seventh Circuit's "private gain" approach, has nevertheless required it in borderline cases that do not amount to common-law fraud - for

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[17] The judges of the Seventh Circuit have encountered some recent disagreement as to the scope of the private gain limitation. See United States v. Sorich, ___ F.3d ___, 2008 WL 2579186 (7th Cir. 2008) (Kanne & Posner, JJ., dissenting from denial of rehearing en banc). Such a division of opinion even within the circuit provides further reason for this Court to consider whether, and to what extent, a private gain limitation should be applied to the statute.

instance, cases that are predicated on nondisclosure of a conflict of interest. In such cases, where the petitioner's actions are inherently ambiguous and may not represent an abdication of impartiality, private gain is what proves corrupt intentions. See United States v. Woodward, 149 F.3d 46, 54 (1st Cir. 1998) (to constitute honest services fraud, nondisclosure of a conflict of interest must "result[] in personal gain"); United States v. Sawyer, 85 F.3d 713, 724-25 (1st Cir. 1996) (same).

The Non-Expansion Approach

The Second Circuit in United States v. Rybicki, 354 F.3d 124, 138 (2d Cir. 2003) (en banc) adopted yet another approach by holding that 18 U.S.C. § 1346 froze honest services law at its pre-McNally scope and that Federal courts cannot expand the reach of the doctrine beyond what existed just before McNally.[18] The court thus held

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[18] Although Rybicki was a private-sector case and did not make a definitive statement as to what the scope of the public sector honest services doctrine was at the time of McNally, petitioner notes that no pre-McNally case ever held that nondisclosure of material information without personal gain could be prosecuted as Federal fraud. See Bloom, 149 F.3d at 656 ("[n]o case we can find in the long history of intangible rights prosecutions holds that a breach of fiduciary

that, in order to determine whether any given act by a public or private official is prosecutable as honest services fraud, it is necessary to survey the pre-McNally case law and assess whether he could have been held criminally liable at that time. See id. at 138-43.

The Sixth Circuit is arguably trending toward a similar approach. In United States v. Turner, 465 F.3d 667, 675 (6th Cir. 2006), that court considered the issue of whether election fraud could be prosecuted as mail or wire fraud. The court found that, by restoring liability in Section 1346 only for deprivations of honest services rather than other forms of intangible rights fraud, Congress authorized prosecution only of those offenses that were considered to be honest-services fraud prior to McNally. The court then surveyed pre-McNally precedent and, upon finding that no court had described election fraud in terms of honest services, held that it could not be prosecuted as mail fraud. See id. at 675-76.

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duty, without misuse of one's position for private gain, is an intangible rights fraud"). Thus, it is strongly arguable that petitioner Geddings could not have been prosecuted for honest services fraud had he committed the disputed conduct in the Second Circuit.

The Borderline Limitation Approach

The Fourth Circuit in the pre-McNally case of United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), adopted a further approach of distinguishing between classically fraudulent acts and borderline cases. The Mandel court held that the honest services doctrine clearly applies to acts that constitute common-law fraud, such as bribery. See Mandel, 591 F.2d at 1362-63. In borderline cases, however - such as those predicated upon nondisclosure of material information - a mere breach of fiduciary duty is not sufficient, and must be accompanied by other indicia of "actionable fraud." Id. at 1364. The court found such indicia to exist in two situations: (1) "where a public official fails to disclose the existence of a *direct interest* in a matter that he is *passing on*;" and (2) where "there has been a fraudulent statement of facts, or a deliberate concealment thereof, to a public body, in order to receive a benefit by action of the public body." Id. (emphasis added).

The Mandel formula was praised by legal scholars, who noted that it correctly focused on direct influence to the public official's discretion rather than imposing an "impossibly broad" obligation to "disclose all conflicts of interest by...

[any] public official." See John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Am. Crim. L. Rev. 427, 464 (1998). The continuing vitality of the Mandel limitations, however, is in question within the Fourth Circuit. In the instant case, the Fourth Circuit rejected petitioner's Mandel-based argument, holding that, because the panel opinion in Mandel was reviewed en banc, that opinion was vacated and had no legal force. More recently, however, the same court in United States v. Harvey, ___ F.3d ___, 2008 WL 2720718, *3 (4th Cir. 2008), held that the Mandel panel opinion was "affirmed in relevant part" by the en banc court and that it continued to define the scope of honest services fraud. The uncertainty as to whether the Mandel limitations still apply within the Fourth Circuit - an uncertainty that worked to petitioner's great detriment - leaves public officials in that circuit with no way to determine in advance whether their actions constitute a Federal crime, and is yet another reason why this Court should intervene to determine the scope of the statute.

This Court Should Adopt a Mixed Approach

Each of these approaches provides meaningful, common-sense boundaries to the otherwise limitless honest services fraud statute, and each protects important constitutional interests.

The Third and Fifth Circuits' holdings protect the autonomy of state and local governments by allowing state legislatures to define their standards of honest services for themselves, and restrict the scope of Federal fraud to violations of state penal laws rather than ethical or contractual lapses. The personal gain limitation distinguishes genuine and prosecutable corruption from the mere appearance thereof. The ban on expansion beyond McNally cabins the reach of the statute at what existed prior to 1987 and provides officials with fair notice through a strictly defined body of case law. Finally, the Mandel limitations allow classically fraudulent conduct to be freely prosecuted while more clearly defining the boundaries of the statute in borderline cases. In the Circuits that have adopted one or more of these approaches, petitioner Geddings could not have been prosecuted.

Among these options, however, petitioner submits that a combination of the state-law and private gain limitations - which, as discussed above, have begun to meld into each other in circuits such as the First - is the optimal limitation on the scope of Section 1346. These approaches go beyond merely limiting the scope of the statute - which is salutary in itself - to serve considerations that this Court has found compelling, including federalism and the need

to distinguish the appearance of corruption from the reality.

Moreover, these approaches, in combination, answer the rule of lenity considerations last expressed by this Court in McNally:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it. But if state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

McNally, 483 U.S. at 361 n.9. Just as the pre-1988 mail and wire fraud statutes did not bespeak an intent to criminalize undisclosed conflicts of interest

without underlying state law violations, the vague and amorphous honest services statute also fails to do so. Given that Congress rejected a draft bill that would have brought any "bias" by a public official within the scope of the statute, see Brumley, 116 F.3d at 743 (Jolly & DeMoss, JJ., dissenting), and given that a conflict of interest standing alone is arguably neither "dishonest" nor a "service," the "much clearer indication" required by McNally has still not been made. Petitioner thus submits that, given the overwhelming considerations of federalism, overbreadth and the rule of lenity as applied to this case, this Court should grant *certiorari* to define and limit the scope of 18 U.S.C. § 1346.

POINT II

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER 18 U.S.C. § 1346 IS VOID FOR VAGUENESS AS APPLIED TO THE FACTS OF THIS CASE

Second, assuming *arguendo* that this Court declines to take up the question of how Section 1346 should be limited as a general matter, it should grant *certiorari* to determine whether it was unconstitutionally applied in this case. In a case such as this one that is at or beyond the frontiers of

honest services fraud, the question always remains of whether 18 U.S.C. § 1346 is unconstitutionally vague as applied. The panel opinion disposed of this issue in a footnote, holding that "*the language of the statute* provides notice of the wrongfulness of Geddings' conduct" (emphasis added). As many courts have recognized, however, the language of Section 1346 provides no more guidance than a commandment to "do good" or "not to do wrong." See United States v. Handakas, 286 F.3d 92, 104 (2d Cir. 2002), overruled in part on other grounds, United States v. Rybicki 354 F.3d 124, 144 (2d Cir. 2003) (en banc); see also Brown, 459 F.3d at 520, 522 & n.9 (Section 1346 is "vague and amorphous on its face," and its "outer boundaries... must be determined from the factual circumstances supporting affirmed convictions"); Urciuoli, 513 F.3d at 294 ("the concept of 'honest services' is vague and undefined by the statute"); Genova, 333 F.3d at 757-58 (courts may not use Section 1346 to "expand the scope of illegality").

Courts have found, therefore, that Section 1346 passes constitutional muster *only to the extent that prior case law has defined particular conduct as within its scope*. See Brown, 459 F.3d at 520; see also Rybicki, 354 F.3d at 138 (limiting scope of statute to pre-McNally case law). It is the meaning placed upon "honest services" by judicial

interpretation that provides fair notice to the public and cabins prosecutorial discretion. The necessary corollary is that, where case law *does not* provide notice that the petitioner's specific conduct constitutes a deprivation of honest services, then Section 1346 cannot constitutionally be applied.

The principle that fair notice must be found in prior case law has been reaffirmed by this Court. In United States v. Lanier, 520 U.S. 259, 271 (1997), the Court stated that "[d]ue process bars courts from applying a novel construction of a criminal statute to conduct that *neither the statute nor a prior judicial decision* has fairly disclosed to be within its scope" (emphasis added).

Indeed, Congress itself has cautioned against broadening the scope of Federal fraud beyond existing case law. A 1984 committee report on the proposed bank fraud statute stated in pertinent part:

> The [proposed statute] parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretation of those sections. *The Committee, however, is concerned by the history of*

> *expansive interpretations of that language by the courts.*
>
> The current scope of the wire and mail fraud offenses *is clearly greater than that intended by Congress.* Although the Committee endorses the current interpretations of the language, *it does not anticipate any further expansion.* The Committee believes that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, *due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage.*

H.R. Rep. 98-901, 98th Cong., 2d Sess., at 4 (1984) (emphasis added). These considerations are equally compelling when applied to the honest services statute, and support the proposition that Congress did not intend Section 1346 to expand the scope of Federal fraud beyond existing case law interpretations.

In the instant case, petitioner could not possibly have divined, either from the plain language of Section 1346 or from prior judicial

interpretation, that his conduct might constitute a Federal crime. As discussed at length in Point I above, no Federal court has ever held that nondisclosure of material information, without more, constitutes deprivation of honest services. Moreover, Federal courts are consistent in holding that Section 1346 is not violated by conduct that creates only the appearance of corruption and is unaccompanied by personal gain or actual corrupt conduct in office. The Government conceded at sentencing that it was unaware of any case with similar facts, and the district court could not locate any in adjudicating petitioner's motion for acquittal.[19] This is because *there is no such case*, and thus no notice to petitioner that his conduct was Federally proscribed.

Indeed, far from providing clear notice to petitioner that his conduct was a Federal offense, the prior case law of the circuit in which he was prosecuted would have clearly signaled to petitioner that he was *not* committing honest services fraud.

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[19] In addition to Mandel and United States v. Bryan, 58 F.3d 933, 940 (4th Cir. 1995), the court below relied upon United States v. Woodward, 149 F.3d 46 (1st Cir. 1998); and United States v. Bush, 522 F.2d 641 (7th Cir. 1975). None of these cases, however, is factually analogous to the case at bar, because all involved either explicit self-dealing (Bryan and Bush) or acceptance of bribes in return for official action (Mandel and Woodward).

As discussed in Point I above, this Court held in Mandel that nondisclosure of material information was not a crime unless it constituted (1) concealment of a "direct interest" in a matter being "passed on" in an official capacity; or (2) concealment of material facts from a public body in order to obtain a tangible benefit from that body. See Mandel, 592 F.2d at 1364-65. Given that neither of those circumstances existed in the instant case (and indeed could not have existed due to petitioner's voluntary recusal from vendor selection votes), petitioner could not possibly have anticipated that his conduct might lead to a mail fraud prosecution. If a statute is unconstitutionally vague as applied where judicial precedent does not give notice of its applicability to the petitioner's conduct, how much more so when such precedent affirmatively misleads petitioner into believing that he has not committed a crime.

Moreover, the vagueness of Section 1346 as applied to petitioner is compounded by the Fourth Circuit's uneven treatment of its Mandel precedent. In United States v. Bryan, 58 F.3d 933, 940 (4th Cir. 1995), the Fourth Circuit relied heavily on Mandel in its constitutional vagueness analysis and characterized it as being "affirmed in relevant part" by the *en banc* court, thus suggesting to subsequent public officials such as petitioner Geddings that they could look to Mandel for guidance. The panel

opinion in this case, however, rejected petitioner's reliance on Mandel, holding that it had no legal force because it had been reviewed en banc. But then the same court, in a decision handed down *after* petitioner's conviction was affirmed, again held that Mandel defined the scope of honest services fraud. See United States v. Harvey, ___ F.3d ___, 2008 WL 2720718, *3 (4th Cir. 2008). This sort of cat-and-mouse game - to suggest that petitioner might rely on certain precedent in weighing whether his conduct is criminal only to tell him after the fact that he cannot - is precisely what the Due Process Clause forbids.

Finally, the absence of fair notice is compounded by the fact that the Government's interpretation of the honest services statute would leave its enforcement to the unbridled discretion of Federal prosecutors. If the scope of Section 1346 is not limited to the bounds of prior case law, prosecutors could retroactively define as a Federal crime any conduct that does not meet with their approval. See United States v. Martin, 195 F.3d 961, 965 (7th Cir. 1999). In other words, such an open-ended construction would create a system of "fraud by hindsight" in which members of the public could not avoid criminal liability. Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.).

Enforcement of a Federal criminal statute that carries the possibility of five years' imprisonment cannot be left to such arbitrary and retrospective discretion. As Judge Easterbrook of the Seventh Circuit stated in a similar context:

> Although we understand the temptation to dilate criminal statutes so that corrupt officials get their comeuppance, people are entitled to clear notice of what the law forbids, and the courts must take care not to enlarge the scope of illegality.

United States v. Genova, 333 F.3d 750, 757-58 (7th Cir. 2003). In the instant case, no matter if petitioner's conduct can be subjectively classified as reprehensible or unethical, it is equally beyond the outer limits of honest services fraud as the meaning of that term has been developed by the courts. Petitioner's conviction cannot be sustained consistently with the requirements of due process, and this Court should thus grant *certiorari* to determine whether 18 U.S.C. § 1346 was unconstitutionally applied to him.

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition and, upon review, should reverse petitioner's conviction and direct that all charges against him be dismissed.

Dated: New York, NY
September 2, 2008

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No. _____

In The
Supreme Court of the United States

KEVIN L. GEDDINGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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DECISION DATED MAY 19, 2008

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4544

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN L. GEDDINGS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:06-cr-00136-D)

Before NIEMEYER and SHEDD, Circuit Judges, and Patrick Michael DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Argued: January 31, 2008 Decided: May 19, 2008

Affirmed by unpublished opinion. Judge Shedd wrote the opinion, inwhich Judge Niemeyer and Judge Duffy joined.

ARGUED: Jonathan I. Edelstein, New York, New York, for Appellant. John Stuart Bruce, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh,North Carolina, for Appellee. ON BRIEF: Abraham Abramovsky, FORDHAM UNIVERSITY, School of Law, New York, New York, for Appellant. George E. B. Holding, United States Attorney, Anne M.Hayes, Assistant United States Attorney, Dennis M. Duffy, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

SHEDD, Circuit Judge: A federal jury convicted Kevin Geddings of five counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1346

based on his failure to disclose a conflict of interest as a North Carolina lottery commissioner. The district court sentenced Geddings to 48-months' imprisonment, and he now appeals his conviction and sentence. We affirm.

I.

Viewing the evidence in the light most favorable to thegovernment, see Glasser v. United States, 315 U.S. 60, 80 (1942), the following are the facts. Geddings has long been involved in the promotion of lotteries. In 1998, South Carolina gubernatorial candidate Jim Hodges hired Geddings' public relations/political consultant firm, Geddings and Phillips Communications, LLC ("Geddings/Phillips") for his campaign.

Whether South Carolina should adopt a lottery became a focus of that campaign, and Geddings created advertisements highlighting incumbent Governor David Beasley's opposition to the lottery. After Hodges defeated Beasley, Geddings served as his chief of staff and laterparticipated in his reelection campaign. During South Carolina's lottery debate, Geddings developed a business relationship with lottery vendor Scientific Games

International, Inc. ("Scientific Games").[1] Geddings received $163,545 from Scientific Games over the course of their relationship, which extended from 2000 to 2005. In 2000,Scientific Games hired Geddings to create advertisements supporting a referendum to amend the South Carolina Constitution and allow the creation of a lottery. On October 5, 2001, Scientific Games contributed $35,000 to South Carolinians for an Effective Lottery, LLC ("SC Effective Lottery"), a for-profit organization formed by Geddings. On October 22, 2001, Geddings emailed a negative article regarding GTech's operation of the Texas lottery to the chairman of the South Carolina Lottery Commission and noted:"[j]ust wanted you to be ready for an onslaught of bad press if Gtech [sic] wins SC contract." J.A. 3996. Three days later, SC Effective Lottery distributed $29,500 to Geddings/Phillips. On October 30, 2001, Scientific Games received the on-line portion ofthe South Carolina lottery contract.

Geddings moved to North Carolina in 2003, and he continued his relationship with Scientific Games. In 2004 and 2005, Scientific Games retained

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[1] According to the record, Scientific Games holds the marketleadingposition in scratch or instant lottery tickets and issecond in online lottery games. Its primary competitor, GTECHCorporation ("GTech"), leads in online lottery games

Geddings to promote a lottery in North Carolina. Geddings prepared elected officials for debates and produced advertisements in support of the lottery. In July 2005, Alan Middleton, Scientific Games' vice president for government relations, notified his accounting department that Scientific Games would likely pay Geddings $5,000 per month for the next 6-18 months.[2] North Carolina adopted a lottery in August 2005.

In September 2005, Geddings sought appointment to the nine member North Carolina Lottery Commission ("Lottery Commission"). He emailed Scientific Games' lobbyist Meredith Norris and told her to keep him in mind if she wanted "a foot soldier to serve [on the Lottery Commission] who will be loyal to the Speaker." J.A. 3224. Norris had formerly worked for James B. Black, Speaker of the North Carolina House of Representatives. On September 23, 2005, Speaker Black appointed Geddings to the Lottery Commission.

The executive order establishing the North Carolina Board of Ethics ("Ethics Board") requires public officials to "fully disclose any potential conflict

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[2] Middleton is a close friend of Geddings who previously workedfor Scientific Games in South Carolina as a consultant.

of interest or appearance of conflict." N.C. Exec. Order No. 76 (2005). After his appointment, Geddings submitted a "Long Form" Statement of Economic Interest("Ethics Form") to the Ethics Board. Geddings provided no response to Question 16, which is a broad catch-all question requiring the disclosure of conflicts of interest. Specifically, Question 16 states:

> Having read the Order in general and the 'Rules of onduct for Public Officials' in particular, provide any other information which a reasonable person would conclude is necessary or helpful either to carry out the purposes of the Order or to fully disclose any potential conflict of interest or appearance of conflict. Identify any conflicts or potential conflicts you may have that are not fully or adequately covered elsewhere in this form. Include an explanation of how you would propose to resolve any conflicts or potential conflicts.

J.A. 3218. After the Ethics Board requested additional information, Geddings supplied the following answer, which indicated his friendship with Middleton, but omitted his financial

relationship with Scientific Games:

> I have a longstanding friendship and previous business relationship with Mr. Alan Middleton, a vice presidentwith Scientific Games Corp. a potential N.C. Education Lottery vendor. Mr. Middleton and I have been friends since 1987. Between 2000 and 2001 Mr. Middleton's company, Carolina Public Affairs sublet office space from me. In 2002, he joined Scientific Games. I currently have no business relationship with Mr. Middleton, although he remains a friend.
>
> I should note as well, that as a former chief of staff to the Governor of South Carolina, I helped with that state's lottery start-up and enjoyed several opportunities to meet privately with GTech staff and representatives, including Mr. Don Sweitzer, Mr. Ted Riley and Mr. Chris Shaban. I have learned much from listening to the 'lessons learned' by executives from both major lottery system companies.
>
> In 2000, my company, Geddings &

> Phillips Communications, LLC also conducted focus groups of potential lottery customers in South Carolina for a lottery vendor company known then as IGT-Anchor Gaming. IGT-Anchor Gaming was later purchased by Scientific Games.
>
> My company, Geddings & Phillips Communications, along with my two radio stations WXNC-AM in Monroe, NC and WKMT-AM in Kings Mountain, NC have no current business relationships with any lottery vendor. Although I am in the process of selling my two radio stations, I pledge to not accept any lottery advertising contracts for these stations or any others I may own during my term on the Education Lottery Commission.
>
> In addition, to avoid even the "appearance" of unfair vendor consideration, I will not vote on any final vendor contract award that involves Scientific Games or Gtech.

J.A. 3229. Based on the revised Ethics Form, the Ethics Board reported on October 12, 2005, to

Speaker Black and to the Lottery Commission that Geddings did not have an actual conflict of interest but had "the potential for a conflict of interest." J.A.3221-22. Had Geddings disclosed his financial relationship with Scientific Games, the Ethics Board would have concluded that he had an actual conflict of interest. J.A. 1178.

After his appointment as a commissioner, Geddings continued a relationship with Scientific Games. He emailed his secretary on September 26, 2005, and instructed her never to acknowledge by phone that Scientific Games "is a client." J.A. 3856 (emphasis added). On October 7, 2005, Scientific Games paid him $9,500. Three days later, Geddings' secretary forwarded him the invoice for the month of October for submission to Scientific Games.

Geddings kept in almost daily contact with Middleton. He communicated with Middleton even after the Lottery Commission adopted a policy proposed by Geddings that prohibited lottery commissioners from meeting individually with lottery vendors. Geddings was appointed to the Lottery Commission personnel committee on October 4, 2005. On that same day, when such information was confidential, Geddings informed Middleton of the membership of the personnel committee. The composition of thecommittee did not become publicly

available until October 6, 2005.

Although Geddings had recused himself from lottery vendors election, he circulated negative articles regarding GTech, as he had done in South Carolina.[3] He sent one article regarding allegations of corruption against GTech in Pennsylvania to the Chairman of the Lottery Commission, Dr. Charles Sanders, with a note: "The press everywhere loves these stories." J.A. 3896. He sent another article detailing allegations of corruption in Gtech's operation of the Texas lottery to Chairman Sanders' assistant, with a note: "It's worth reading just to see what 'ugly' issues can emerge with lottery operations over time." J.A. 4201.

The United States Attorney's Office for the Eastern District of North Carolina began an investigation related to the passage of the North Carolina lottery and requested certain records from Scientific Games around October 26, 2005. In response to that inquiry, Scientific Games collected records of all payments made by Scientific Games to Geddings over the course of their relationship. Ira Raphaelson, outside counsel to Scientific Games,

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[3] The Executive Director of the Ethics Board, Perry Newson, stated to the Lottery Commission that such a recusal prohibited indirect lobbying.

asked Geddings if he had informed the Lottery Commission of his receipt of these payments. Geddings stated that he had not disclosed receiving the payments and that if he had, he would not have become a lottery commissioner. Furthermore, Geddings told Raphaelson that if Scientific Games turned over records of the payments that he would be "done" as a lottery commissioner. J.A. 1090. Raphaelson stated that Scientific Games intended to provide records of the payments to the United States Attorney's Office. Four days later on November 1, 2001, Geddings resigned from the Lottery Commission.

Geddings was indicted for using the mails and wires to execute a scheme to defraud the citizens of North Carolina of his honest services in violation of §§ 1341 and 1346. The indictment charges that Geddings concealed his conflict of interest with Scientific Games and aided that company's efforts to obtain a contract from North Carolina to operate the state's lottery. The jury convicted Geddings of five counts of mail fraud,[4] based on the following five mailings: (1) a letter, which the Governor of North Carolina mailed to appoint Geddings to the Lottery Commission; (2) Geddings' Ethics Form, which he sent to the Ethics Board; (3) a copy of the Ethics

[4] The jury acquitted Geddings of wire fraud.

Board's finding that Geddings had no actual conflict of interest, which the Ethics Board mailed to Chairman Sanders; (4) a copy of the Ethics Board's finding that Geddings had no actual conflict of interest, which the Ethics Board mailed to Geddings; and (5) Geddings' oath of office, which he sent to the Governor of NorthCarolina.

At sentencing, the district court used U.S.S.G. § 2C1.1 to determine Geddings' base offense level of 14. Geddings received a four-level enhancement for being a high-level public official and a two-level enhancement for obstruction of justice, resulting in a total offense level of 20. See U.S.S.G. § 3C1.1; U.S.S.G. §2C1.1(b)(3). Because Geddings' criminal history placed him in Category I, the advisory Sentencing Guideline range was 33-41 months. After considering the 18 U.S.C. § 3553(a) factors, the district court applied a seven-month upward variance, for a total sentence of 48 months.

II.

Geddings first argues that the government presented insufficient evidence to support his conviction for mail fraud. In reviewing such a claim, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser, 315 U.S.

at 80. Substantial evidence is "evidence which a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003) (quotation omitted). The federal mail fraud statute prohibits using the mails[5] for the purpose of executing "any scheme or artifice to defraud." §1341. Congress defined "scheme or artifice to defraud" to include"a scheme or artifice to deprive another of the intangible right of honest services." § 1346. Here, Geddings executed such a scheme by concealing his conflict of interest with Scientific Games and acting for its benefit as a lottery commissioner.[6]

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[5] Geddings does not contest the mailings in this case.

[6] Geddings argues that the government must demonstrate that he received personal gain to sustain his conviction under §§ 1341 and1346. Neither the statute nor our case law requires that a defendant receive personal gain. See generally United States v.Bryan, 58 F.3d 933 (4th Cir. 1995) (upholding a conviction with no evidence of personal gain) abrogated in part on other grounds by United States v. O'Hagan, 521 U.S. 642, 650 (1997). To the extent Geddings bases his argument on the panel opinion in United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), on rehearing, 602 F.2d653 (4th Cir. 1979) (en banc), that panel opinion has no legal effect. Under Fourth Circuit rules, "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." 4th Cir. R.35(c).

Geddings' conflict of interest resulted from a substantial financial relationship with Scientific Games, which he concealed when submitting his Ethics Form. Scientific Games paid Geddings a total of $163,545, including $24,500 the year he became a lottery commissioner, including $9,500 after he was appointed to the Lottery Commission. As a lottery commissioner, Geddings instructed his secretary to never acknowledge that Scientific Games "is a client." J.A. 3856 (emphasis added). Regarding the concealment of his conflict of interest, Geddings stated to Raphaelson that he"did not disclose [his] work for Scientific Games" on his Ethics Form because if he had made such a disclosure he "wouldn't have gotten the position [on the Lottery Commission]." J.A. 1090.

After becoming a lottery commissioner, Geddings took actions benefiting Scientific Games. Before the Lottery Commission awarded North Carolina's lottery vendor contract, Geddings distributed to Chairman Sanders articles critical of Scientific Games' primary competitor, GTech.[7] He kept in almost daily contact with Middleton, and continued to communicate with him even after the

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[7] Geddings argues that the articles were not negative, but Chairman Sanders testified that he interpreted them to be negative.

Lottery Commission adopted a policy prohibiting members from individually meeting with lottery vendors. Furthermore, he provided confidential information to Middleton identifying the membership of the Lottery Commission's personnel committee.

In short, a reasonable jury could find beyond a reasonable doubt that Geddings deprived the citizens of North Carolina of his honest services in violation of §§ 1341 and 1346.[8]

III.

Geddings next challenges the reasonableness of his 48-month sentence. We review a district court's imposition of a sentence for abuse of

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[8] Geddings contends that §§ 1341 and 1346 are unconstitutionally vague as applied to him. We find that the language of the statute provides notice of the wrongfulness of Geddings' conduct and adequately prevents arbitrary enforcement. United States v. Klecker, 348 F.3d 69, 71 (4th Cir. 2003) (explaining that the constitutional vagueness inquiry examines both public notice and arbitrary enforcement). Geddings also challenges the district court's admission of testimony for the government, and the district court's denial of Geddings' request for surrebuttal. We review these rulings for abuse of discretion and find no error. See United States v. Achiekwelu, 112 F.3d 747, 753 (4th Cir. 1997).

discretion. United States v. Pauley, 511 F.3d 468,473 (4th Cir. 2007)(citing Gall v. United States, 128 S. Ct. 586,596 (2007)).

We first review for procedural errors, such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence --including an explanation for any deviation from the Guidelines range." Gall, 128 S.Ct. at 597. Next, we consider the substantive reasonableness of the sentence. Id. "Substantive reasonableness review entails taking into account the totality of the circumstances, including the extent of any variance from the Guidelines range." Pauley, 511 F.3d at 473. While we may presume a sentence within the Guidelines range to be reasonable, we may not presume a sentence outside the range to be unreasonable. Id. Moreover, we must give due deference to the district court's decision that the § 3553(a) factors justify imposing a sentence outside the Guidelines range and to its determination regarding the extent of any variance. Id. at 473-74. Even if we would have reached a different sentencing result on our own, this fact alone is not sufficient to justify reversal of the district court. Id. at 474.

The district court used U.S.S.G. § 2C1.1 to determine Geddings' base offense level of 14. Geddings argues that the district court should have applied § 2C1.3 because that section applies to conflict of interest offenses. We find no error because the Guidelines' statutory index lists § 2C1.1 as the section corresponding to a violation of § 1341.

The district court notified the parties that it was considering an upward variance from the advisory 33-41 month Guideline range. In its 30-page order imposing a seven-month upward variance, the district court analyzed all the § 3553factors, including the fact that Geddings' wife has type I diabetes and that his son suffers from autism. Based on the record, the district court determined that two factors in particular supported an upward variance: (1) the need for deterrence, and (2) the harm caused to the lottery. In light of all the facts of this case, we conclude that the district court did not abuse its discretion in applying a seven-month upward variance and sentencing Geddings to48-months' imprisonment.

IV.

We affirm Geddings' conviction for five counts of mail fraud and his 48-month sentence.

AFFIRMED

ORDER DATED JUNE 16, 2008

FILED: June 16, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4544
(5:06-cr-00136-D)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KEVIN L. GEDDINGS,

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk